



Appl. No.	:	10/684,018	Confirmation No.	3231
Applicant	:	Gary Meyer		
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Art Unit	:	3637		
Examiner	:	A, Phi Dieu Tran		
Customer No.	:	30244		

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

[illegible]

I, Gary Meyer, being first duly sworn, depose and say that I am the President of NxGen, LLC, a Colorado Limited Liability Company, which I founded in 2003 for the purpose of making and selling interchangeable raised access floor panels. Our floor panels are unique in that they have integrated lifting handles (Claims 1, 11) and levelers (Claims 10, 11), for use in the retro-fit market, for installation on a variety of previously installed pedestal support systems made by differing manufactures and of different configurations. I have been involved in the design, engineering, and marketing of raised access floor systems for the past twenty-one years and am viewed as an expert in raised

access floor industry. I am the inventor of the subject matter described in U. S. Pat. App. Ser. No. 10/684,018 (the "Patent Application") of which includes my integrated handles and vertically adjustable panel levelers designed into the floor panel, as opposed to prior art adjustable pedestal supports, and am familiar with the above referenced Patent Application.

BACKGROUND INFORMATION

(Long Felt Need)

NxGen, LLC was formed to develop my idea for a raised access floor panel that was capable of retro-fit placement on any previously installed pedestal and stringer support matrix that had been made in the past 70 years. This need was driven by the fact that: with aging data centers the floor panels could no longer be replaced because of obsolescence or discontinuation of the floor panels themselves. The ability of data centers to be able to replace their damaged floor panels, or to upgrade their floor, was restricted by the fact that their raised floor panels were not designed to be inter-changeable in thickness between competing manufacturers.

When operating, data centers generate a great deal of revenue. Thus, it is very costly to shut down an entire facility, for months, in order to replace an entire floor system with an entirely new system having matching panels, pedestals and stringers. In dealing with this ever growing problem, it became apparent to me that if I could design an adjustable raised floor panel which would be compatible with previously installed pedestal and stringer systems that floor panel replacement could be performed on a panel-by-panel basis rather than to completely re-build the entire facility from the subfloor up. This concept would thereby save the industry an enormous amount of cost.

In order to satisfy this need, I would have to design a universal retro-fit panel that could match the thickness of the previously installed panels. I

concluded that the best way to solve the thickness problem was to design a panel of a single thickness with a built in leveling mechanism. The leveling mechanism would have to be accessible through the panel top in order to level the floor vertically, up or down, thereby eliminating the need to adjust each of the pedestal support members (as in Spransy et al 7360343) with respect to the thickness of my universal floor panel. Moreover, with my universal panel, whenever it was moved, from location-to-location, the integrated leveling mechanism would enable easy adjustment for a level fit with other panels which surrounded it.

In addition, replacement floor systems are increasingly using perforated floor panels, in order to address heat build-up, because perforated panels allow for air-flow circulation between the subfloor and the data center. However, since inception of the industry, the standard method for removing raised floor panels was to use a suction cup to lift the panels from their stringers, but because one could not lift a perforated surface with a suction device, installers who needed to remove perforated panels used levers (screw drivers, ice picks, pliers, crow bars, etc.) in order to remove perforated panels. These actions created all kinds of safety issues (trapping fingers, toes, etc.) because the panels would slip from the chosen device.

As a result, I conceived to incorporate into my universal retro-fit floor panel an integrated handle which could be used to lift the panel, but which would have to collapse flat and tightly in order to generate a flush walking surface, once the panel was in place. Thus, in my preferred embodiment for my new universal retro-fit perforated floor panel, as disclosed in my Patent Application, I included a perforated floor panel having levelers and recessed handles.

COMMERCIAL SUCCESS

The success of this product came by word-of-mouth recommendations throughout the industry beginning in 2003 and continuing up through the present

date. Sales by NxGen, LLC have exceeded 7,000 panels, under the registered trademark *Triad*, notwithstanding the fact that these panels cost three to four times of what is standard in the industry, with sales and licensing opportunities rapidly increasing. Indeed, the fact that several of the dominant raised floor manufacturers allow their distribution to offer my universal retro-fit panels is further evidence of the novelty of my invention.

On information and belief, I calculate that the annual market for retrofit panels is 25,000 per year. I have reviewed our sales for the last three (3) years for the *Triad* panels as evidence of expanding sales, which do not include sales made by *Infinity* (see licensing of my invention by others, below). I estimate *Infinity* is selling 10,000 panels per year and *Triad* is now close to 5,000 panels per year, of the 25,000 retro-fit airflow panel market. Thus, the *Triad* design, in accordance with Claims 1, 10, and 11 of the Patent Application, is capturing 60% of the market share, since its introduction. The other 40% of the market is being replaced by original equipment manufacture. The success this combined market share is directly attributable to my new and unobvious design for handles and corner levelers as claimed in Claims 1, 10, and 11 of the Patent Application.

In my opinion, my floor panels were new and not obvious in that, notwithstanding the great need for a successful universal retro-fit perforated floor panel capable of use in the data center market, and notwithstanding the constant quest for a solution to the problem, it was not until NxGen, LLC produced its successful retro-fit panel, as shown and described in Claims 1, 10, 11 of the Patent Application, that a universal retrofit perforated panel became a reality.

In my opinion, the commercial success of NxGen, LLC has resulted from its sales of the universal retro-fit perforated floor panel having the leveler mechanisms (Claims 10, 11) and handles (Claims 1, 11) as claimed in the Patent Application.

LICENSING BY OTHERS PRIOR TO ISSUE OF THE PATENT APPLICATION

In 2007, NxGen, LLC and I were compelled to defend the subject matter set forth in the Patent Application by commencing an unfair competition suit in the United States District Court for the District of Colorado styled *NxGen LLC, v. Mark O. DeJonge, Jim Clifford, and Opstock, Inc., Civil Action No. 07-cv-00396-WYD-KLM*. This suit was brought against one of NxGen, LLC's former distributors of the *Triad* retro-fit perforated floor panel, as claimed in the Patent Application (Claims 1, 10, 11), for making and selling a knock off of my universal retro-fit floor panel under the mark *Infinity*. That litigation was settled on 23 October, 2007 with a covenant not to sue, by NxGen, LLC and I, for patent infringement, in exchange for royalties on sales of the *Infinity* panels, on any claim which is subsequently allowed to issue on U.S. Pat. App. Ser. No. 10/684,018. The Defendants in that litigation are now aggressively selling the *Infinity* Air Grate, under the covenant not to sue, as a line of universal retro fit panels including corner levelers (Claims 10, 11) and recessed handles (Claims 1, 11). The displacement of the competing *Infinity* device through litigation, copying of my *Triad* floor panel, the licensing by others even before issuance, and sales of more than 10,000 competing *Infinity* panels once again illustrates that my invention, as disclosed and claimed in the Patent Application (Claims 1, 10, 11), was new and not obvious to those skilled in the art at the time that the invention was made.

MEANING OF THE REFERENCES

I have reviewed the Official Action of 20 October, 2008, the references cited in support of the Examiner's rejections, and, as an expert in the field, am of the following opinions as to the meaning of the references:

The Examiner has rejected Claim 1 as being anticipated by Lang et al (5123776). However, Lang et al discloses a plastic manhole cover and not a raised access computer room floor panel having a lower surface to be supported on a plurality of pedestal support members. There is no way possible to support the manhole cover of Lang et al on any existing access floor pedestal and stringer support system known in the art. While it does show a handles (80) positioned in recessed portions (82), unlike the present invention, the handles in Lang et al are made of a steel rod 3/8" in diameter (Col. 3, l. 10) and recess downwardly into an oval shaped opening. Thus, it does not have the top and side walls as claimed in the Patent Application. This configuration will not work in a floor panel because it does not provide a flat level walking surface, and could result in tripping or other injuries which is one of the problems that I sought to overcome with my invention. The handles shown in Lang et al also are not adjacent to a lateral edge of the floor panel, which is necessary for lifting one edge of a floor panel upwardly from the underlying supporting frame work, at an angle, due to the extreme weight of a floor panel when constructed of steel and coated.

The Examiner has also rejected Claim 10 as being anticipated by, and Claim 11 as obvious in view of, Spransy et al (7360343). The Examiner states that Spransy et al (figures 1, 6) shows an adjustable panel leveler means (22), threadably connected to the floor panel through a hole disposed adjacent to each corner of the floor panel, for biasing against a pedestal support member. However Spransy et al (7360343 B1) shows what was old in the art by providing adjustable pedestals (22) threadably connected to the pedestal head in order to adjust the height of the floor in relation to the subfloor prior to installation of the floor panels. This method is exactly what I sought to overcome and was the problem which had impeded the industry in the development of a universal retro fit floor panel. I discovered the solution to this problem by integrating the levelers into the panel for adjustment of the panel *in situ*. Also, in Spransy et al, the threaded screws (26) are used to fasten the floor panel to the pedestal head, not to level the

panel, after the pedestal support members had been adjusted in height in relation to the subfloor. In this manner, unlike my invention, the floor panel cannot be adjusted in height with the floor panel in place to match a thickness of the existing adjacent floor panels and systems which had been in use over the past 70 years. This does not provide an imbedded threadably connected level device connected to the raised floor panel through hole disposed adjacent to each of the four corners of the floor panel, for biasing against a pedestal support member, operating using successive movements of the panel leveler from the upper surface without utilization of sub-structure pedestal support leveling mechanism. Thus, Spransy et al neither teaches nor suggests my new panel levelers, but shows what was only old in the art, prior to my invention.

It surprising to many of those knowledgeable in the data center that a raised floor panel could designed that would fit in almost all new and existing raised floor systems, provide a safe/secure lifting method. The new and unobvious design is being proven again by the interest of international data center fabricators desiring to have a purchase and sales relationship internationally.

STATE OF COLORADO)
) SS.

COUNTY OF JEFFERSON)

Glary Meyer first being duly sworn, on his oath says that he has read the foregoing 1.132 Affidavit and knows the content thereof, that the same is true of his own knowledge except as to those matters therein stated to be on information and belief which he believes to be true.

This document has been subscribed and affirmed, or sworn to before me in the county of Jefferson, state of Colorado, this 6th day of January, 2009.

Mitchell Thomas
Notary Public

My Commission Expires:

GRETCHEN THOMAS
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires Feb. 20, 2009